

- IDENTIFY THE PROBLEM.

The Z'berg-Nejedly Forest Practices Act of 1973 prohibits a person from conducting timber operations, as defined, unless a timber harvesting plan prepared by a Registered Professional Forester and approved by CAL FIRE. The Forest Practice Act authorizes the State Board of Forestry and Fire Protection (Board) to exempt from some or all of those provisions of the act a person engaging in specified forest management activities, including, the cutting or removal of trees in compliance with existing law relating to defensible space that eliminates the vertical continuity of vegetative fuels and the horizontal continuity of tree crowns for the purpose of reducing flammable materials and maintaining a fuel break for a distance of no more than 150 feet on each side from a legally permitted structure that complies with the California Building Standards Code.

In 2013, Assemblyman Patterson introduced AB 1867, which ultimately was chaptered by the administration. As a result PRC 4584 was amended, and now authorizes the Board to further exempt a person engaging in the cutting or removal of trees in compliance with existing law relating to defensible space that eliminates the vertical continuity of vegetative fuels and the horizontal continuity of tree crowns for the purpose of reducing flammable materials and maintaining a fuel break for a distance of no more than 300 feet on each side of a "habitable structure", as defined in PRC 4584. PRC 4584 states, in part, that the Board shall adopt regulations to enact the new provisions of the Public Resources Code by January 1, 2016.

GATHERING RELEVANT LEGAL INFORMATION.

Authority cited: Sections 4551, 4553, 4584 and 4584.1, Public Resources Code.
Reference: Sections 4516, 4527 and 4584

Consistency: *EPIC v. California Department of Forestry and Fire Protection and Board of Forestry* (1996) 43 Cal. App.4th 1011.

- GATHERING RELEVANT FACTUAL INFORMATION.

Existing regulation in 14 CCR § 1038 (c) address what is commonly known as the 150 foot exemption. These existing Board regulations, promulgated pursuant to PRC 4584, consist of the same intent and the newly adopted provisions of AB 1867. Therefore, reliance upon these existing regulations as guidance in the development of portions of this regulatory effort may be prudent and appropriate. Additionally, there are several other existing Board regulations, particularly as they apply to slash treatment and hazard reduction that may be appropriate references in the development of theses required proposed regulatory standards.

The standard 150 foot exemption, as regulated pursuant to 14 CCR § 1038(c), has been effective for many years. CAL FIRE staff, as the enforcement agency responsible for oversight of these exemptions, will be able to supply valuable insight on the development of the required proposed regulatory standards in

contrast to the enforcement of the existing exemption available to landowners under 14 CCR § 1038.

The Department has developed existing forms, as referenced in 14 CCR § 1038.2, for landowners and Licensed Timber Operators to prepare and submit to the Department prior to operations occurring under the existing exemption process. The Board may consider reviewing the existing forms as a means of research and information gathering in the development of the proposed regulatory standards as required under AB 1867.

- DRAFT THE PROPOSED TEXT OF THE REGULATION.

- ALTERNATIVES.

Are there any reasonable alternatives to the regulations proposed by the agency? The APA requires a state agency to consider/analyze alternatives, select preferred alternative and explain reasons for rejecting alternatives not selected. (Gov. Code, § 11346.2, subd. (b)(4))

- Describe & Evaluate Reasonable Alternatives: While an agency need not artificially construct alternatives or describe unreasonable alternatives (Gov. Code, § 11346.2, subd. (b)(4)(C)), the agency must describe alternative regulations that are reasonable approaches to achieving the purpose sought and the reasons for rejecting them.

These include, but are not limited to:

- Alternatives that are less burdensome and equally effective in achieving the goal of the authorizing statute (Gov. Code, § 11346.2, subd. (b)(4)(A));
- Alternatives that would lessen any adverse impact on small business (Gov. Code, § 11346.2, subd. (b)(4)(B));
- Any alternatives that are proposed by the public or considered by the agency as less burdensome and equally effective (see Gov. Code, § 11346.9, subd. (a)(4));
- Any alternatives that are proposed by the public and/or considered by the agency that would be more effective (see Gov. Code, § 11346.9, subd. (a)(4)); and
- Any alternatives that are proposed by the public and/or considered by the agency that would be more cost effective and

equally effective in effectuating the purpose of the statute (see Gov. Code, § 11346.9, subd. (a)(4)).

- Alternatives that may lessen adverse impact on business may involve (A) establishing differing compliance or reporting requirements or timetables that take into account the resources available to businesses, (B) consolidation or simplification of compliance or reporting requirements, (C) exemptions or partial exemptions, and (D) the use of performance standards rather than prescriptive standards (see below).

Performance Standard v. Prescriptive Standard: "In the case of a regulation that would mandate the use of specific technologies or equipment or prescribe specific actions or procedures, the imposition of performance standards shall be considered as an alternative." (Gov. Code, § 11346.2, subds. (b)(4) & (b)(4)(A))

"Prescriptive standard" means a regulation that specifies the sole means of compliance with a performance standard by specific actions, measurements, or other quantifiable means. (Gov. Code, § 11342.590)

"Performance standard" means a regulation that describes an objective with the criteria stated for achieving the objective. (Gov. Code, § 11342.570)

You must explain the reason for rejecting the performance standard.

Select the Preferred Alternative: Once you have identified and evaluated any alternatives, select the preferred alternative from the reasonable alternatives, if any, that have been proposed and/or considered, and for each of the reasonable alternatives not selected, draft an explanation of the reasons for rejecting that alternative. The description of each proposed/considered alternative and the explanation for rejecting each one will be used in drafting the ISOR. (Gov. Code, § 11346.2, subd. (b)(4))

- **DETERMINE PURPOSE AND DEMONSTRATE THE NECESSITY FOR THE DRAFTED REGULATIONS.**

Purpose: The purpose of the proposed regulations should reflect the intent of the statute(s) being implemented, interpreted, or made specific in the rulemaking. How do the proposed regulations address the problem identified by the agency? To find the purpose of a statute, look first to the words of the pertinent statute(s). Sometimes the purpose is set out at the beginning of the chapter or article, or maybe in un-codified statutory provisions. If the purpose is not set out in the language of the statute, purpose may be gleaned from legislative history materials. If you can't identify the purpose from either the words or the legislative history, sometimes the purpose is obvious from what the statute addresses. You may sometimes find the purpose of a statute stated in a court decision.

Describe the benefits of the regulation. The purpose of the statute may be to achieve some benefit or goal. (For example, the purposes of the APA are to provide a meaningful opportunity for public participation and to create a record for judicial review.) So, think about and state the benefits and goals of the statute you are planning to implement, interpret, or make specific.

Necessity: An agency must be able to demonstrate why each provision of the regulation is reasonably necessary to effectuate the purposes of the statute(s) or other provisions of law the regulation implements, interprets or makes specific, AND is reasonably necessary to address the problem the agency intends to address. In other words, explain why the agency is addressing the problem and effectuating the purpose of the statute in this particular way.

Documents Relied Upon: Identify each technical, theoretical, empirical study, report, or similar document, if any, the agency is relying upon to support the necessity for the regulation. Sometimes an explanatory statement will itself be adequate. Other times the statement or one or more of its parts will have to be demonstrated by the use of studies, reports, documents or other material relied upon by the agency. The bottom line is that the rulemaking record must contain substantial evidence to demonstrate that the regulation is reasonably necessary to effectuate the purposes of the statute(s) or other provisions of law the regulation implements, interprets or makes specific, AND address the problem the agency intends to address.

- **ANALYZE THE FISCAL /ECONOMIC EFFECTS OF THE REGULATION.**

Economic Impact Assessment (EIA): Except for major regulations (discussed above), the agency must prepare an Economic Impact Analysis/Assessment (BIA) that analyzes whether and to what extent the regulation will affect:

- the creation or elimination of jobs within the State of California,
- the creation of new businesses or the elimination of existing businesses within the State of California,
- the expansion of businesses currently doing business within the State of California, and
- the benefits of the regulation to the health and welfare of California residents, worker safety, and the state's environment.

This assessment must be based upon adequate information concerning the consequences of the proposed regulation. (See Gov. Code, § 11346.3, subd. (e)).

In other words, the BIA must contain sufficient information to explain how the agency reached the stated results.

Cost Impacts On Representative Person or Business: Describe the cost impacts known to the agency that a representative private person or business would incur to comply with the proposed regulation. This is "the amount of reasonable range of direct costs, or a description of the type and extent of direct costs, that a representative private person or business necessarily incurs in reasonable compliance with the proposed action." (Gov. Code, §

Reporting Requirement: Determine whether the proposed regulation establishes a reporting requirement that applies to business. If a reporting requirement created by the regulation does apply to business, your agency must include a finding the NOPA that the requirement "is necessary for the health, safety, or welfare of the people of the state that the regulation apply to businesses."

Warning: If you do not include this finding, the reporting requirement does not apply to business. (Gov. Code, § 11346.3 subd. (d))

Effects on Small Business: Determine whether the selected alternative affects small business using the definition of "small business" in the APA at section Government Code section 11342.610. If you decide the selected alternative does not affect small business, prepare a brief explanation of the reasons for that decision. (1CCR 4)

- **ADDITIONAL CONSIDERATIONS.**

Consistency With Existing State Regulations: The agency must evaluate whether the proposed regulation is inconsistent or incompatible with existing state regulations. (Gov. Code, § 11346.5, subd. (a)(3)(D))

Federal Conformity: Determine whether the proposed regulation differs substantially from an existing comparable federal regulation or statute. If it does, draft a brief description of the significant differences and identify the full citation of the federal regulations or statutes. This information will be used when drafting the NOPA. (Gov. Code, § 11346.5, subd. (a)(3)(B))

Identical to Existing Federal Regulation: Determine whether the proposed regulation is identical to previously adopted /amended federal regulation. If so, then include a statement to that effect in the NOPA along with a citation to where an explanation of the provisions of the regulation can be found. If applicable, this is sufficient to satisfy the ISOR and FSOR requirements. (Gov. Code §§ 11346.2, subd. (c) and 11346.9, subd. (c))

Efforts to Avoid Duplication or Conflict with Federal Regulations: This evaluation applies only to a department, board, or commission within the

Environmental Protection Agency, the Natural Resources Agency, or the Office of the State Fire Marshal. Draft a description of your efforts to avoid unnecessary duplication or conflict with federal regulations addressing the same issues. You may adopt differing regulations "upon a finding of one or more of the following justifications:

a) The differing state regulations are authorized by law; or b) The cost of differing state regulations is justified by the benefit to human health, public safety, public welfare, or the environment. This evaluation must be made available to the public. (Gov. Code, § 11346.2, subd. (b)(6))